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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-6738

EDWARD EARL DILLINGHAM,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on October 2, 1974. A Motion For Leave To File Out Of Time is annexed hereto.

OPINIONS BELOW

Petitioner was tried before a jury in the United States District Court for the Northern District of Georgia, Atlanta Division, and was found guilty by a jury verdict on February 2, 1973, for violations of the Dyer Act, 18 USC, Sec. 2312 and 2313, and the General Federal Conspiracy Statute, 18 USC, Sec. 371.

The appeal to the United States Court of Appeals for the Fifth Circuit was decided on October 2, 1974. In its opinion, the Court of Appeals affirmed the judgment of the District Court. A copy of that opinion is attached on Appendix 1a. A copy of the judgment entered herein by the United States Court of Appeals for

the Fifth Circuit is attached hereto as Appendix 1b.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to the provisions of 28 United States Code, Sec. 1254. The judgment sought to be reviewed was entered in the United States Court of Appeals for the Fifth Circuit on October 2, 1974.

QUESTIONS PRESENTED

I. CERTIORARI MUST BE GRANTED BECAUSE THERE IS A SUBSTANTIAL CONFLICT BETWEEN THE CIRCUITS ON A SUBSTANTIAL QUESTION OF CONSTITUTIONAL LAW WHERE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT INCORRECTLY APPLIED THE NARROW TEST OF UNITED STATES V. MARION REQUIRING A SUBSTANTIAL SHOWING OF ACTUAL PREJUDICE TO A POST-ARREST PRE-INDICTMENT DELAY OF 22 MONTHS WHEN THE BROAD TEST OF BARKER V. WINGO SHOULD HAVE BEEN APPLIED TO THE TOTAL POST-ARREST DELAY OF 24 MONTHS AND THE RESULT DENIED PETITIONER HIS SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL.

II. CERTIORARI MUST BE GRANTED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT INCORRECTLY CONCLUDED THAT THE DISCRETION GIVEN THE DISTRICT COURT BY FEDERAL RULE OF CRIMINAL PROCEDURE 48(b) TO DISMISS AN INDICTMENT IF THERE IS UNNECESSARY PROSECUTORIAL DELAY DID NOT COMPEL DISMISSAL IF CONSTITUTIONAL REQUIREMENTS WERE SATISFIED WHEN, IN FACT, IN THIS CASE, THE CONSTITUTIONAL REQUIREMENTS OF THE SIXTH AMENDMENT WERE NOT SATISFIED.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves the Fifth and Sixth Amendments, United States Constitution. In addition, it involves Federal Rule of Criminal Procedure 48(b).

STATEMENT OF THE CASE

Petitioner and fifteen other defendants were indicted for their respective roles in an interstate automobile theft ring. The theft ring operated and existed from approximately October 26, 1969, to April 10, 1970. Of the sixteen defendants originally charged, two pleaded guilty, five were voluntarily discharged, three were acquitted, and six were convicted. Petitioner was convicted on all fifteen counts; the first count being violation of the General Federal Conspiracy Statute, 18 USC, Sec. 371, and the remaining counts being violations of the Dyer Act, 18 USC, Sec. 2312 and 2313.

The Federal Bureau of Investigation knew of the case as early as January 23, 1970. [S.R. 106]. 1/ A Federal warrant was issued against Petitioner on April 3, 1970, and three of the vehicles that were involved had been recovered by that date. [S.R. 107]. The Petitioner was arrested on April 6, 1970, in the State of Florida, [S.R. 27] and he was advised that he was being charged with interstate transportation of stolen motor vehicles. [S.R. 31]. The Petitioner was indicted on February 2, 1972. [S.R. 64, 65]. From arrest until indictment there was a delay of 22 months.

The arraignment was scheduled for July 28, 1972, [S.R. 67] and there had been no previous arraignment in Petitioner's case. [S.R. 69]. No attempt had been made to contact the Petitioner prior to July of 1972. [S.R. 67, 70, 71].

Petitioner did not receive notice of the arraignment and was subsequently arrested on September 18, 1972. [S.R. 40, 41]. Petitioner's arrest was the first notice to Petitioner that he had been indicted. [S.R. 59, 60]. Petitioner was then arraigned on October 20, 1972, some 31 months after his initial arrest. Petitioner asserted his right to a speedy trial immediately by filing a Motion To Dismiss on October 30, 1972. Petitioner's case proceeded to trial on January 22, 1973, and was concluded when Petitioner was found guilty by a jury verdict on February 2, 1973.

On March 14, 1973, Petitioner filed his Second Motion To Dismiss The Indictment, which again raised the question of Petitioner having been denied a speedy trial as required by the United States Constitution, Sixth Amendment. The Honorable Charles A. Moye, United States District Judge, denied Petitioner's motion on

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1/ "R." will be used to designate references to the trial transcript. "S.R." will be used to designate the supplementary transcript of the evidentiary hearing on Petitioner's Motion To Dismiss The Indictment.

March 26, 1973.

Petitioner appealed the decision of the United States District Court for the Northern District of Georgia to the United States Court of Appeals for the Fifth Circuit. In its decision of October 2, 1974, the Court of Appeals affirmed the decision of the District Court.

In its opinion, the United States Court of Appeals for the Fifth Circuit divided and distinguished the 34-month period of delay from arrest until trial into one period of post-arrest pre-indictment delay of 22 months and applied the narrow test of United States v. Marion which they held required a substantial showing of actual prejudice, and into a second period of post-indictment pre-trial delay of approximately 12 months and applied the broad test of Barker v. Wingo. 2/

REASONS FOR GRANTING THE WRIT

I. CERTIORARI MUST BE GRANTED BECAUSE THERE IS A SUBSTANTIAL CONFLICT BETWEEN THE CIRCUITS ON A SUBSTANTIAL QUESTION OF CONSTITUTIONAL LAW WHERE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT INCORRECTLY APPLIED THE NARROW TEST OF UNITED STATES V. MARION REQUIRING A SUBSTANTIAL SHOWING OF ACTUAL PREJUDICE TO A POST-ARREST PRE-INDICTMENT DELAY OF 22 MONTHS WHEN THE BROAD TEST OF BARKER V. WINGO SHOULD HAVE BEEN APPLIED TO THE TOTAL POST-ARREST DELAY OF 24 MONTHS AND THE RESULT DENIED PETITIONER HIS SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL.

A. In determining whether there has been a denial of the right to a speedy trial, the courts engage in a process of balancing the conduct of both the prosecution and the defense. Balancing involves an examination of four factors -- length of delay, reason for the delay, defendant's assertion of his right and prejudice to the defendant.

Prior to examining a claim for denial of the right to speedy trial, the accused must have standing to assert this claim. Since the guarantee of the Sixth Amendment right to a speedy trial

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2/ The United States Court of Appeals decision is U.S. v. Palmer, 502 F.2d 1233 (5th Cir 1974). The Fifth Circuit's decision will hereinafter be referred to as Palmer. (Appendix 1a).

does not attach until a criminal prosecution has begun, and since the guaranteed rights extend only to those persons accused in the course of the prosecution, such standing in a Sixth Amendment context is not found with respect to pre-accusation delays.

There is no constitutional right to be accused of a crime, and the provision of the Sixth Amendment that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ..." is "activated only when a criminal prosecution has begun and extends only to those persons who have been accused in the course of that prosecution." United States v. Marion, 404 U.S. 307, 313 (1971). 3/ Such a right "would seem to afford no protection to those not yet accused, nor would they seem to require the government to discover, investigate and accuse any person within any particular period of time." Marion, supra at 313.

The United States Court of Appeals for the Fifth Circuit has interpreted Marion, supra, as creating two tests which are to be used in determining whether or not a defendant's Sixth Amendment rights have been denied. Marion, supra, did not establish two separate Sixth Amendment tests, the one to be used depending on whether law enforcement officials got an indictment or made an arrest first. The Supreme Court in Marion, supra, did point out that there were two tests which might come into play in this area, but only one was to be used to determine if there was a denial to the defendant of his Sixth Amendment Rights. The other was to be used to determine if the defendant's Fifth Amendment Due Process rights had been violated. The test to be used, or rather the Amendment

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3/ See also, cases cited on page 315, fn. 8. Pre-accusation delays would be examined within the parameters of the applicable statutes of limitations, and with respect to whether the delay violated the Due Process guarantee of the Fifth Amendment. Marion, supra, at 323-324.

to be applied, depends on whether or not the defendant had become the accused. The Court clearly stated:

> In our view, however, the Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an "accused," ... Marion, supra at 313. (Emphasis added.)

This Court strengthened this point when it again stated:

> So viewed it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.
>
> Invocation of the speedy trial provision thus need not wait indictment, information, or other formal charge. But we decline to extend the reach of the amendment to the period prior to arrest. (Emphasis added.)

Marion, supra at 320, 321.

Thus in Marion, supra, this Court was quite clear; the protections of the Sixth Amendment speedy trial provision attach when the defendant in some way, be it by indictment, information or arrest, becomes the accused. It was the belief of the Court, one which was clearly expressed, that it was unnecessary to extend the protection of the Sixth Amendment beyond the time when one became the accused either by indictment, information or arrest. During this pre-accusation period one was sufficiently protected by the applicable statute of limitation. Marion, supra. But this Court recognized that there were times when the statute of limitations alone would not sufficiently protect one who had not yet become an accused:

> ... it is appropriate to note here that the statute of limitations does not fully define the appellees' rights with respect to events occurring prior to indictment. ... [T]he Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment (pre-accusation) delay in this case caused a substantial prejudice to appellees' rights to a fair trial ...

Marion, supra at 324.

Here then is the second standard that the Court in Marion, supra, established. It is one requiring a showing of substantial prejudice, but it is to be applied to those delays which occurred prior to the defendant becoming the accused. It is to be used to determine if the defendant's Fifth Amendment Due Process rights, which have already attached, and not his Sixth Amendment speedy trial rights which have not yet attached, have been violated. It is at this point that the United States Court of Appeals for the Fifth Circuit has erred. The Fifth Circuit has used the substantial actual prejudice standard, which is the standard for the Fifth Amendment, to determine if the defendant's rights have been violated during the post-arrest pre-indictment period, clearly a post-accusation period. In so doing, that is in failing to recognize this time frame as a part of the post-accusation period, and therefore correctly applying the broader test of Barker, infra, which is the standard for the Sixth Amendment, the Fifth Circuit has differed with the First, Sixth and Seventh Circuit Courts of Appeals.

Were Petitioner brought before a federal court in either the First, Sixth or Seventh Circuit Courts of Appeals, it is clear that the broader test and the standards defined by Barker, infra, and its progeny, infra, would have been applied to Petitioner's situation. The United States Court of Appeals for the Sixth Circuit has taken the position that when arrest occurs prior to indictment the protection of the Sixth Amendment speedy trial provision attaches upon arrest. Edmaiston v. Neil, 452 F.2d 491 (6th Cir 1971). Circuit Judge Celebrezze speaking for the Court in Edmaiston, supra, noted the Fifth Circuit's position when he said:

> We first consider the threshold problem posed by the fact that the bulk of the delay complained of occurred after arrest, but before indictment. At least one Circuit has held that speedy trial pro-

> tection does not apply at all in such circumstances. (Citations omitted). We do not agree with that conclusion. (Emphasis added.)

Judge Celebrezze continues his analysis by saying:

> The great weight of authority supports the view that in the present situation "the right (to speedy trial protection) attaches upon arrest." (Citations omitted.)
>
> These decisions, holding that speedy trial protection applied whenever an individual is charged with a crime, whether at the time of arrest or indictment, would seem to be consistent with the purposes which the Supreme Court has said underlie the Sixth Amendment.

Edmaiston, supra at 497.

The United States Court of Appeals for the First Circuit is in agreement with the Sixth Circuit. In a case involving a post-arrest pre-indictment period of approximately fifteen months, which was the result of neglect, the First Circuit in United States v. Cabral, 475 F.2d 715 (1st Cir 1973) held that the speedy trial provision of the Sixth Amendment had attached by saying: "It is clear that appellant's right to a speedy trial crystallized at the time of his initial arrest." Cabral, supra at 718. The First Circuit then applied the broad test established by Barker, infra.

In United States v. Macino, 486 F.2d 750 (7th Cir 1973), a case involving a post-arrest pre-indictment delay of over two years, the United States Court of Appeals for the Seventh Circuit held that the speedy trial provisions of the Sixth Amendment had attached, and that the balancing test of Barker, infra, and its progeny, infra, were to be used to determine if the defendant had been denied his speedy trial rights. Even the dissent agreed that Barker, infra, was to be applied, differing only in the outcome when it was applied.

The holdings of the United States Court of Appeals for the Fifth Circuit are at odds and in direct conflict with the holdings of the First, Sixth and Seventh Circuit Courts of Appeals. By its misapplication of Marion, supra, the United States Court of Appeals for the Fifth Circuit has placed a heavier burden on Petitioner than would the First, Sixth and Seventh Circuit Courts of Appeals if Petitioner were a defendant in those circuits.

B. The Sixth Amendment right to a speedy trial protects both the interests of the Defendant and of the society as a whole; for this reason, the allegations of a denial of this right are examined by balancing the conduct of both the prosecution and the defense. The Supreme Court cannot protect these interests by requiring a specified time within which a trial must be had, yet it will not put the entire burden for a speedy trial on the defendant alone.

As long ago as the turn of the century, the Supreme Court recognized that "... the right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." Beavers v. Haubert, 198 U.S. 77 (1905).

Society's interest in providing a speedy trial exists separate from, and sometimes in opposition to, the interest of the accused. Barker v. Wingo, 407 U.S. 514 at 519 (1972). Society desires to decrease the backlog of cases in urban courts and the possibility that persons out on bond will commit other crimes and to deter those contemplating criminal acts. Barker, supra; Dickey v. Florida, 398 U.S. 30 (1970). In addition, speedier trials decrease the possibility that an accused will jump bail; if he is not given bail, or cannot raise the funds, society is interested in decreasing the time he spends in jail, and thereby decreasing prison costs and minimizing the loss of any wages which the individual may earn. Also, speedier trials may decrease the support society often provides to the family of incarcerated breadwinners. Finally, decreasing delay between arrest, or accusation, may increase the possibilities of rehabilitation. Barker, supra at 520-521.

The defendant, for his part, may desire a speedy trial to decrease the possibility that the memories of his witnesses will

fail or that physical evidence will be lost; he would rather be able to combat the prosecution's charges directly, rather than relying solely on the infirmities in the Government's case. Dickey, supra at 37; see also, Justice Brennan's concurrence at page 41-42. In addition, the defendant may wish to minimize his own anxiety and concern accompanying public accusation, and to minimize the public scorn and detrimental effect on his employment, speech and associations. Dickey, supra at 41-42.

Until the Supreme Court's decision in Barker, supra, it was unsettled just how to go about protecting the respective interests involved in the speedy trial question. On the one hand, some legislatures enacted laws, and some courts adopted rules which required a criminal defendant to be offered a trial within a specified time. See, Barker, supra at 523, fn. 17. If no trial was had in this defined period, prosecution on that charge was forever barred. Id. The Court rejected this approach on the grounds that it would require the Court "... to engage in legislative or rule-making activity, rather than in the adjudicative process to which we (the Supreme Court) should confine our efforts." Id. The Court, however, recognized the right of the legislature to prescribe a reasonable period within which a trial must be held, or be forever barred, so long as this period was consistent with constitutional standards. Barker, supra.

A second alternative relied upon as a means to protect the respective interests in the speedy trial area was known as the "demand rule." Barker, supra at 524. The rule has two different outlooks. Some courts have said that the defendant's assertion of a demand for a speedy trial, or lack thereof, is just one factor to be considered and weighed in determining the validity of a claimed denial of this right. Barker, supra at 528. Other courts have taken the view that the rule is really a "demand-waiver" rule. "The demand-waiver doctrine provides that a defendant waives any consideration of his right to speedy trial for any period prior to which he has not demanded a trial." Barker, supra at 525.

The Supreme Court in Barker, supra, adopted the view that the defendant's assertion of a demand for a speedy trial, or his failure to demand a speedy trial, is merely one of the factors relevant to the inquiry into the deprivation of the defendant's right to a speedy trial.

The United States Court of Appeals for the Fifth Circuit did not consider Petitioner's failure to assert his right to a speedy trial to be a serious fault. Palmer, supra at 1243. But their opinion reflects that they did not consider it to be a relevant factor in the balancing test which Barker, supra, promulgated as the method for determining whether or not a defendant had been denied his right to a speedy trial insofar as it should have been applied to all post-arrest delay. In the first part of the Fifth Circuit's opinion in Palmer, supra, in which the Court analyzed the post-arrest pre-indictment delay of Petitioner, the Court unequivocally erred when they stated:

> Therefore, in applying the Sixth Amendment to a post-arrest pre-indictment situation, our attention is focused on "actual prejudice" -- and only peripherally on such factors as length of and reason for the delay."

Palmer, supra at 1237.

C. The courts should assess four factors in determining whether a particular defendant has been deprived of his right to a speedy trial. Barker, supra at 530.

This Court in choosing a balancing test in which the conduct of both the prosecution and the defendant are weighed, recognized that such a test "necessarily compels" courts to approach speedy trial cases on an ad hoc basis. Barker, supra. Nonetheless, the Court felt that four factors could be used by the courts to assess whether or not a defendant had been denied his right to

a speedy trial. Such factors were: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Barker, supra at 530. Accord, Hoskins v. Wainwright, 485 F.2d 1186, 1191-1192 (5th Cir 1973); Arrant v. Wainwright, 468 F.2d 677, 679 (5th Cir 1972).

LENGTH OF DELAY

This Court noted as follows:

> The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case.

Barker, supra at 530-531.

The courts have been widely divergent in their approach to what time lapse does or does not constitute a permissible delay. For example, the First Circuit found a nine month delay overly long in United States v. Butler, 426 F.2d 1275, 1277 (1st Cir 1970). The District Court in Delaware, on the other hand, found that a delay of eleven months was not per se excessive, though it could become so in light of the other factors cited in Barker. United States v. Hanna, 347 F. Supp. 1010, 1012 (D.C. Del. 1972). However, the Court of Appeals for the District of Columbia in Hinton v. United States, 424 F.2d 876 (D.C. Cir 1969), held that a delay of more than one year between arrest and trial raises a speedy trial claim of prima facie merit. Accord, United States v. Rucker, 464 F.2d. 823 (D.C. Cir 1972). Obviously, as the length of the delay increases between the time when the Sixth Amendment right to a speedy trial attaches and the trial itself is held, there is more potential that the length of the delay alone will be prima facie evidence of a violation of the accused's constitutional rights, and the burden to justify this delay increases. Rucker, supra at 825.

> When the delay approaches a year and a half, as in this case, the Government must provide a justification which convincingly outweighs the prejudice which can normally be assumed to have been caused to the defendant.

Id.

In this case, the delay from the date of Petitioner's arrest on April 6, 1970, until the date of Petitioner's indictment on February 9, 1972, was twenty-two months. The delay from formal indictment on February 9, 1972, until trial on January 22, 1973, was an additional delay of approximately twelve months. Therefore the total delay from arrest until trial in the case sub judice is approximately thirty-four months. Under the Rucker analysis, supra, this not only raises a Sixth Amendment claim of prima facie merit, but also puts a heavy burden on the Government to show "justification which convincingly outweighs the prejudice which can normally be assumed to have been caused to the defendant." Id.

THE REASON FOR DELAY

At no time from the date of Petitioner's arrest to the date the indictment was filed was the Petitioner responsible for the almost two year delay that resulted, and the record is clear that Petitioner was not responsible for the additional delay of approximately one year from indictment until the commencement of the trial. Palmer, supra at 1243.

It appears from the supplementary record that there were two primary reasons for the delay in bringing Petitioner's case to trial, notwithstanding the fact that the case was a complex automobile theft ring conspiracy case. The first reason was due to repeated category reassignment within the United States Attorney's office and the second reason was because of the shortage of manpower in the FBI office to properly investigate the case and to bring it to indictment.

Assistant United States Attorney, Bob Smith, originally

authorized the prosecution on April 3, 1970. [S.R. 76]. This was the date that the Federal warrant issued against Petitioner. Petitioner was arrested three days later on April 6, 1970. [S.R. 27]. The case was assigned to Assistant United States Attorney Julian Owen Forrester in April of 1970. [S.R. 74]. Assistant United States Attorney Forrester met with the Special Agent of the FBI, William J. Watry, who was assigned to the case, and discussed what had to be done to prepare the case for trial. [S.R. 85]. The case was reassigned from Assistant United States Attorney Forrester to Assistant United States Attorney Robert E. Witley in July of 1970 because of category reassignment. [Record 75, 76, 89]. Assistant United States Attorney Whitley testified that during the seven months that he had responsibility for the case he was preoccupied with another trial. [S.R. 89]. Mr. Whitley testified at the evidentiary hearing that he worked with Agent Watry for the FBI but did not recall any conversation he had had with him. [S.R. 89]. Mr. Whitley further testified that he did not go through the file [S.R. 92], but that he was aware that there was still investigation into the case. [S.R. 93].

On March 20, 1971, the case was assigned to Assistant United States Attorney Anthony Arnold [S.R. 97, 99]. He did not talk with Agent Watry of the ABI until May of 1971. [S.R. 97]. Mr. Arnold testified Agent Watry of the FBI was working on another matter [S.R. 97], and it was not until July of 1971 that Mr. Arnold and Agent Watry started planning the Government's strategy on how to indict the case. [S.R. 97]. At this time approximately eighteen months had elapsed. Mr. Arnold further testified at the evidentiary hearing that he had responsibility for the case for approximately five or six months [S.R. 98] and the case was turned over to Assistant United States Attorney Eugene A. Medori in September, 1971. [S.R. 98]. However, Assistant U.S. Attorney Medori testified that he did not receive the case until September of 1972. [S.R. 62, 63]. Perhaps the conflict in this testimony is a mistake, but it appears clear that there was some confusion due to the repeated reassignment of this case as to who had had responsibility for it.

The second reason for the delay was the lack of manpower devoted to this case from the Federal Bureau of Investigation. Special Agent Watry testified that he knew of the case as early as January 23, 1970. [S.R. 106]. Agent Watry had been the FBI Agent assigned to stolen car cases in the Northern District of Georgia for a long time and was the only Agent responsible for this case. [S.R. 79]. Agent Watry testified that he was inactive in July and August of 1970 due to surgery that hospitalized him for four weeks with an additional four-week recuperation period. [S.R. 109]. He further testified that he was unable to pursue this case because of other matters from November, 1970, until March, 1971. [S.R. 110]. Agent Watry testified that he had lost approximately one year from pursuing this case because of his assignment to another case. [S.R. 20, 119]. Agent Watry testified that the case against Petitioner was stagnating during this period of time because he was the only Agent working this case as well as his other case. [S.R. 111]. Although he considered the other case which was taking him away from the instant case more complex, the length of time from his initial investigation to the end of trial in the more complex case was approximately one year. [S.R. 120]. Agent Watry reached the heart of the matter when he testified that the reason that there was not another agent assigned to the instant case was because there were not enough agents to go around. [S.R. 121].

Although the Government has argued that the reason for the delay in Petitioner's case was due to the complexity of the conspiracy and due to the FBI's difficulty in locating and recovering stolen automobiles, it is clear from the supplementary record that all of the vehicles which were included in the indictment were

recovered by October, 1970, [S.R. 126] except for one vehicle which was recovered in December, 1970. [S.R. 127].

It is also quite clear that the Special Agent of the FBI and the United States Attorney's office had the full cooperation of one of the co-defendants and received a statement from him on April 7, 1970, [S.R. 83], and a comprehensive statement from the same co-defendant in September, 1971. [S.R. 129]. As to the reason for the delay, in summary, it appears that the reason for the delay in the instant case was not because of the complexity of the investigation or the number of vehicles, or the number of individual defendants involved, but because of a constant and periodic reassignment of the case within the United States Attorney's office for the Northern District of Georgia, and the lack of attention devoted to the case by the FBI, who had assigned only one agent to the case in addition to his other duties and including his total absence from the case for a period of over one year together with his two-month absence due to illness. Although the two reasons outlined above are considered more neutral reasons than some other reasons for delay, they should still be considered since the ultimate responsibility for such circumstances must rest with the Government rather than with the Petitioner. Barker, supra; People v. Ganci, 27 N.Y. 2d 418, 318 N.Y.S. 2d 484, 267 N.E. 2d 263 (1971), Cert denied 402 U.S. 924.

THE DEFENDANT'S ASSERTION OF HIS RIGHT

In Barker, supra, the Supreme Court recognized that whether a defendant asserts his right, and how a defendant asserts his right is closely related to the other three factors. The United States Court of Appeals for the Fifth Circuit did not find serious fault with the Petitioner's failure to assert his right to a speedy trial until notification of his indictment. Palmer, supra at 1243. The Court also noted that Petitioner's earliest notice of his indictment was on September 18, 1972, when he was arrested, that he was arraigned on October 20, 1972, that within ten days he filed his First Motion to Dismiss the Indictment on grounds of denial of speedy trial on October 30, 1972, that his motion was denied without prejudice to his right to move for acquittal at trial on December 7, 1972, Palmer, supra, and that a hearing was held on Petitioner's Motion to Dismiss the Indictment. Palmer, supra. It should be noted that Petitioner repeatedly renewed his complaint of denial of speedy trial by motion at the close of the Government's case, [R.], in his motion for a new trial, [R.]. The latter motion being the basis for the District Court's post-trial hearing in March, 1973. [R.]. However, the United States Court of Appeals for the Fifth Circuit was concerned with and concentrated only on the question of a substantial showing of actual prejudice.

PREJUDICE TO DEFENDANT

> Prejudice, of course, should be assessed in the light of the interest of defendants which a speedy trial right was designed to protect. This Court has identified three such interests: (i) To prevent oppressive pre-trial incarceration; (ii) To minimize anxiety and concern of the accused: and (iii) To limit the possibility that the defense will be impaired.

Barker v. Wingo, supra at 532.

The United States Court of Appeals for the Fifth Circuit took the position that the Petitioner had to make a substantial showing of actual prejudice in order for his cause to prevail. Palmer, supra at 1236. This may be true when the situation involves a pre-accusation delay which necessitates the use of the Fifth Amendment Due Process standard to protect the putative defendant, but it is not the standard to be applied to a post-arrest delay. The appropriate standard is that enunciated in Barker, supra. When the Barker standard, or test, is used, it is unneces-

sary for the defendant to make a substantial showing of actual prejudice. In a Per Curiam decision this Court stated: "Barker v. Wingo expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the Constitutional right to a speedy trial." Moore v. Arizona, 414 U.S. 25, 26 (1973).

In Moore, supra, this Court clearly rejected the view which was identical to the action taken by the Fifth Circuit in the case sub judice. The Fifth Circuit failed to heed the teaching of Moore, supra, and the Fifth Circuit held that the burden was on Petitioner to make a substantial showing of actual prejudice. Palmer, supra at 1237, 1239. The proper procedure would have been to presume prejudice and to place the burden on the Government to overcome this through the use of the other factors in the balancing test. Rucker, supra.

In the instant case it should be noted that business records which may have been helpful to Petitioner were lost and that even Agent Watry of the FBI was unable to locate these records. [S.R. 115, 116]. Petitioner also attempted to locate records for the preparation of his defense and was unsuccessful. [S.R. 50-52].

As to the other matters of prejudice to Petitioner, Petitioner testified at the evidentiary hearing that as a result of his arrest on April 6, 1970, he had to spend two months in jail in Broward County, Florida, [S.R. 27], and an additional month in the jails of Jacksonville, Florida; Macon, Georgia; and Atlanta, Fulton County, Georgia. [S.R. 28].

Petitioner testified that he had been prejudiced to the extent that he was unable to obtain employment. [S.R. 31]. He testified extensively as to the effect that this had had on his employment as he sought to obtain jobs in different occupations with different employers and in different cities. [S.R. 32-36-38-42].

Petitioner testified that the pending Federal charges had cost him considerable money. Petitioner's attorney's fees had been approximately $1,600.00 to $1,800.00 [S.R. 42], bonds had been approximately $750.00 to $1,000.00 [S.R. 43], telephone and travel expenses had amounted to between $1,400.00 and $1,600.00 [S.R. 43, 44], the loss of his business due to his arrest had amounted to approximately $4,000.00 [S.R. 44], and Petitioner had lost his automobile [S.R. 45].

Petitioner testified that during the pendency of the Federal charges against him he had had considerable medical problems including a heart attack. [S.R. 45, 46]. Petitioner testified that the pending Federal charges had affected his friendships and business associations. [S.R. 45, 46].

Petitioner testified that the pending Federal charges led to severe family problems resulting in his wife filing for divorce against him on November 6, 1972. [S.R. 46, 47]. And lastly, Petitioner testified that the pending Federal charges led to his wife restricting his visitation with his children. [S.R. 47].

Petitioner believes that the prejudice which he suffered as a result of the delay between his arrest and his trial was the same prejudice the Supreme Court spoke of in terms of preventing oppressive pre-trial incarceration, of minimizing anxiety and concern of the accused and in limiting the possibility that the defense would be impaired.

In summary, Petitioner's contention is that the United States Court of Appeals for the Fifth Circuit has incorrectly interpreted and misapplied the separate test established by United States v. Marion, supra, and Barker v. Wingo, supra. The Fifth Circuit's misinterpretation is clearly evidenced by the Court's decisions prior to Palmer, supra. United States v. Smith, 487 F.2d 175 (5th Cir 1973); United States v. Zane, 489 F.2d 269 (5th Cir 1973). See also United States v. Broadway, 477 F.2d 991 (5th Cir 1973); Hoskins v. Wainwright, 485 F.2d 1186 (5th Cir 1973);

United States v. Schools, 486 F.2d 557 (5th Cir 1973); and United States v. Judice, 457 F.2d 414 (5th Cir 1972). The Fifth Circuit continues to repeat this misapplication. U.S. v. Beckham, 505 F.2d 1316 (5th Cir 1975).

D. This Court has unequivocally stated: "In light of the policies which underlie the right to a speedy trial, dismissal must remain, as Barker noted, 'the only possible remedy'." Strunk v. U.S., 93 Sup. Ct. 2260 (1973).

II. CERTIORARI MUST BE GRANTED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT INCORRECTLY CONCLUDED THAT THE DISCRETION GIVEN THE DISTRICT COURT BY FEDERAL RULE OF CRIMINAL PROCEDURE 48(b) TO DISMISS AN INDICTMENT IF THERE IS UNNECESSARY PROSECUTORIAL DELAY DID NOT COMPEL DISMISSAL IF CONSTITUTIONAL REQUIREMENTS WERE SATISFIED WHEN, IN FACT, IN THIS CASE, THE CONSTITUTIONAL REQUIREMENTS OF THE SIXTH AMENDMENT WERE NOT SATISFIED.

> If there is unnecessary delay in presenting the charge to a grand jury or in filing information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing defendant to trial, the court may dismiss the indictment, information or complaint.

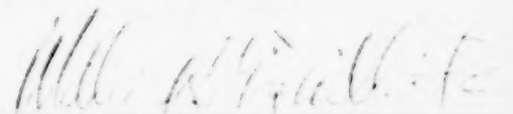
Federal Rule of Criminal Procedure 48(b).

Petitioner submits that the United States Court of Appeals for the Fifth Circuit incorrectly interpreted the meaning of Federal Rule of Criminal Procedure 48(b). Palmer, supra at 1236, fn. 3. Petitioner contends that the constitutional requirements of the Sixth Amendment in regards to Petitioner's right to a speedy trial were not satisfied in the instant case and that Rule 48(b) would have compelled dismissal of the indictment. It is clear that the application of Rule 48(b) is limited to post-arrest situations. United States v. Marion, supra at 319. See cases cited Id. at fn. 11. In the present case, Petitioner's complaint is against all post-arrest delay, and Petitioner contends that with the length of delay and with the prejudice which he experienced, accompanied by the other two factors of the Barker test, the District Court was compelled to dismiss the indictment against Petitioner. U.S. v. Navarra, 310 F. Supp. 521 (D.C. La. 1969). The Fifth Circuit Court of Appeals' interpretation of the meaning of Rule 48(b) is incorrect. This incorrect interpretation is directly related to the issue complained of in Part I of Petitioner's brief.

CONCLUSION

WHEREFORE, for all of the above and foregoing reasons this Honorable Court should grant The Petition for Certiorari.

Respectfully submitted,



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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

EDWARD EARL DILLINGHAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals applied improper criteria in evaluating his claim that he was denied a speedy trial by the 33 1/2 month delay between his initial arrest and trial.

After a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of conspiracy to transport stolen motor vehicles in interstate commerce and of various substantive offenses, in violation of 18 U.S.C. 371, 2312 and 2313.[1/] He was sentenced to imprisonment for five years. The court of appeals affirmed on October 2, 1974 (sub nom. United States v. Palmer, 502 F.2d 1233) (Pet. App.). The petition for a writ of certiorari was not filed

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1/ The government dismissed the charges against five co-defendants; two co-defendants pleaded guilty to a single count of the indictment; the district court directed a judgment of acquittal in favor of one co-defendant; the jury acquitted two co-defendants; petitioner and five co-defendants were convicted (Pet. 2).

until June 26, 1975, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court.[2/]

1. The evidence at trial showed that petitioner was a key member of an automobile theft ring that operated in several southeastern states from October 1969 until April 1970. The members of the ring were responsible for the theft of sixteen cars during that period (Tr. 156-157). Petitioner was employed at the time as a salesman at a Ford dealership in Atlanta, Georgia, from which the first of the cars was stolen on October 25, 1969 (Tr. 53-55, 610). Petitioner's principal function in the conspiracy was to provide fraudulent title papers for the stolen cars, but he also solicited new members for the conspiracy and helped transport and sell several of the vehicles (e.g., 82, 90, 125, 128-130, 151-155, 778). During the course of the operation, petitioner split approximately $20,000 in profits with co-conspirator Robert Rece (Tr. 82). Rece testified for the government at trial and provided the principal testimony linking petitioner to the conspiracy. In addition to other evidence, petitioner was also implicated by the testimony of several witnesses who purchased stolen cars from him (e.g., Tr. 928, 999, 1079, 1153-1156).

2. On April 6, 1970, petitioner was arrested on a warrant charging a violation of the Dyer Act and, following his waiver of a preliminary hearing and the setting of bail, he was incarcerated. On May 28, 1970, he was released on a $1,500

2/ Petitioner has moved for leave to file his petition out of time and has stated, through counsel, that the untimeliness of the petition is principally due to confusion concerning counsel's appointment to represent petitioner in this Court. Petitioner has further stated that "at all times" he advised his counsel that he wished to file a petition for a writ of certiorari and that the untimeliness of the petition is therefore "without fault" on his part. We have no reason to doubt the truthfulness of these statements.

bond. On February 9, 1972, petitioner was indicted with fifteen other persons. He was arraigned on October 20, 1972,[3/] brought to trial on January 22, 1973, and found guilty by a jury on February 2, 1973 (Pet. App. 4).

Prior to trial, petitioner moved to dismiss the indictment on the ground that he had been denied a speedy trial. This motion was denied by the trial court without prejudice to its being later renewed. Following trial, petitioner moved for entry of a judgment of acquittal--contending again that the delay in bringing him to trial following his arrest had infringed his right to a speedy trial. After an evidentiary hearing, the district court denied petitioner's motion for a judgment of acquittal (Pet. 3-4).

In reviewing the substance of petitioner's contention that he was denied his right to a speedy trial, and ultimately rejecting it, the court of appeals considered separately the 22 month period following petitioner's initial arrest and preceding his indictment and the 11 1/2 month period following his indictment and preceding the commencement of his trial. With respect to the 22 month post-arrest/pre-indictment period, the court stated that its attention was appropriately "focused on 'actual prejudice'--and only peripherally on such factors as length of and reason for the delay" (Pet. App. 5). The court evaluated the 11 1/2 month post-indictment period "according to the ad hoc approach required by Barker v. Wingo, guided by the four basic factors therein identified * * *" (Pet. App. 10).

3/ The delay between indictment and arraignment was due to the fact that petitioner had left Georgia and moved to South Carolina without leaving a forwarding address. His whereabouts were not discovered until October 1972 (Pet. App. 10-11).

3. Petitioner now contends that the court of appeals erred in rejecting his speedy trial claim and that that error is attributable to the court's failure properly to evaluate the entire 33 1/2 month period following his initial arrest and preceding the commencement of his trial according to the criteria announced in Barker v. Wingo, 407 U.S. 514.

a. We agree that resolution of the merits of petitioner's speedy trial claim depends upon application of the Barker criteria to the entire period from his initial arrest to the commencement of his trial.

In United States v. Marion, 404 U.S. 307, 313, this Court held that "the Sixth Amendment speedy trial provision has no application until the putative defendant has in some way become an 'accused,' * * *." Since the appellees in Marion were neither arrested, charged nor otherwise subjected to formal restraint prior to indictment, this Court was not required in that case to specify the point at which a person becomes an "accused" for speedy trial purposes, beyond holding that the return of an indictment "transform[s] [persons] into 'accused' defendants who are subject to the speedy trial protections of the Sixth Amendment" (id. at 325). This Court's opinion in Marion appears to leave little doubt, however, that it believed that the policies that inform the right to a speedy trial reach beyond the indictment stage of criminal proceedings and that the right consequently attaches either at the point at which a person is arrested and held to answer on a criminal charge or when he is formally charged by indictment or information, whichever occurs earlier (id. at 320; emphasis supplied):

> To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty,

> whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloguy, and create anxiety in him, his family and his friends. * * * So viewed, it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.

Although the focus of this Court's opinion in Barker v. Wingo, supra, was on prescribing the criteria by which claims of deprivation of the right to a speedy trial are to be judged, and no issue was presented of a possible distinction in the evaluation of post-arrest periods before and after indictment, that opinion further evidences this Court's view that the right attaches at the point that a person is arrested and held to answer on a criminal charge. In discussing the length of the pre-trial delay requiring scrutiny under the Sixth Amendment, for example, the relevant time period was referred to as "the length of delay between arrest and trial * * *" (407 U.S. at 533). Overall, the thrust of the opinion for the Court suggests that once a person has been "accused" of a criminal offense--whether by being arrested and held to answer on a criminal charge or by indictment or information--any subsequent claim by the person concerning his right to a speedy trial must be considered in light of all the criteria there announced. E.g., id. at 520; Rule 48(b), Fed. R. Crim. P.

Finally, petitioner's contention that the court of appeals should have evaluated the entire period following his arrest and preceding his trial under the Barker criteria appears to be supported by this Court's decision in Moore v. Arizona, 414 U.S. 25. The petitioner in Moore argued that the Arizona Supreme Court had misconstrued this Court's decisions in Dickey

v. Florida, 398 U.S. 30, and Barker in holding that a showing of prejudice to the defense at trial was essential to establish a federal speedy trial claim. This Court agreed, repeating the admonition appearing in Barker that none of the four factors there identified (length of delay, reason for delay, defendant's assertion of his right, and prejudice to the defendant) is "'either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial'" (414 U.S. at 26; quoting from Barker v. Wingo, supra, 407 U.S. at 533). Although not explicitly stated in the opinion in Moore, the petition filed in that case (see file in No. 73-5002; Pet. 3) and the opinion of the Arizona Supreme Court (506 P.2d 242, 244) make it clear that the bulk of the delay about which the petitioner there complained had occurred prior to the filing of an information formally charging him.

The court of appeals recognized in the present case that "'post-arrest pre-indictment delay is within the scope of the speedy trial guarantee * * *'" (Pet. App. 5). But the court went on to hold that "'a substantial showing of actual prejudice is required to establish a Sixth Amendment violation in this situation'" and that, with respect to the period prior to indictment, factors such as length of and reason for the delay are entitled only to peripheral consideration (ibid.). The court did not explain in its opinion the rationale underlying its distinction between delays prior to and after indictment, in cases involving a prior arrest; neither has a rationale for the distinction been set forth in previous Fifth Circuit decisions involving similar circumstances (e.g., United States v. Zane, 489 F.2d 269; United States v. Smith, 487 F.2d 175;

see also United States v. Schools, 486 F.2d 557).[4/]

It is not clear to us that the difference in verbal formulation of the standard used by the court of appeals in this case and that called for by Barker is likely to have a significant substantive impact upon the manner in which any particular speedy trial claim is evaluated (and, indeed, as we indicate below, we believe the result in the instant case should be the same under either standard). However, we can perceive no pertinent distinction between pre-indictment and post-indictment delays that would, in light of the policies that inform the speedy trial requirement, justify the application of different standards. Once formal criminal charges have been brought by arrest and the filing of a criminal complaint, the institutional and personal interests that dictate prompt resolution of the charges would appear to be fully activated.[5/] As noted, moreover, we believe that this Court's decisions in Marion, Barker, and Moore require that the entire period following arrest and the filing of a criminal complaint and preceding trial be evaluated in light of the Barker criteria.[6/]

b. Nevertheless, we believe that petitioner's claim that he was denied a speedy trial is without merit. The delay

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4/ Other circuits that have been confronted with the issue involved in this case have applied the Barker criteria without distinguishing between post-arrest/pre-indictment delays and post-indictment/pre-trial delays. E.g., United States v. Macino, 486 F.2d 750 (C.A. 7); United States v. Cabral, 475 F.2d 715 (C.A. 1); Edmaiston v. Nail, 452 F.2d 494 (C.A. 6).

5/ Of course, if the complaint had been dismissed and petitioner had subsequently been indicted, the period between those two events, during which no charges were outstanding, would not be includable in the period of delay for purposes of the speedy trial analysis.

6/ This is not to say that, on the facts of any particular case, there might not be some reason for weighting one of the Barker factors differently because it preceded indictment. But we see no justification for a general rule applying a different standard in all cases.

between petitioner's initial arrest and his trial was 33 1/2 months. Approximately seven months of that period occurred after indictment and was attributable to the fact that petitioner could not be located because he had moved without leaving a forwarding address or advising his relatives of his whereabouts (Pet. App. 10). The remaining 26 months, for which petitioner was not responsible, was not inordinate given the complexity of the case (encompassing transactions in several states and involving ultimately 16 defendants and numerous charges). Petitioner failed, moreover, to establish that he had been prejudiced by the delay.[7/] The two witnesses brought forward by petitioner at the hearing on his motion for a judgment of acquittal did not support his allegation that his ability to defend himself had been impaired because of the delay between his arrest and trial; indeed, their testimony tended to support the contrary conclusion (Pet. App. 7-8). Petitioner also failed to establish "personal" prejudice. As noted by the court of appeals (Pet. App. 9):

> [T]he trial court's express finding that [petitioner's] uncorroborated testimony concerning * * * personal hardships was not credible causes us to take a skeptical view. [Petitioner] admitted an Army court martial and a recent conviction for larceny which, if known to prospective employers or business associates, would have hindered his ability to earn a living. Also, he testified that State charges growing out of the car theft ring contributed to his difficulty in holding a job. Thus, the pending Federal charges were merely cumulative to his otherwise bad record. We, therefore, conclude that any increased strain on this man's life which followed his arrest on these Federal charges does not rise to the level of substantial actual prejudice. (Original emphasis).

7/ Petitioner did not avail himself, during the period between arrest and indictment, of his remedy under Rule 48(b), Fed. R. Crim. P., to obtain dismissal of the complaint for unnecessary delay in presenting his case to the grand jury.

Since petitioner's claim that he was denied a speedy trial is without merit, we respectfully submit that the petition for a writ of certiorari should be denied. Since, however, the court of appeals appears to have articulated an incorrect standard of review, this Court may wish to grant the petition and remand the case to the court of appeals for further consideration.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.